They were in fact asking the Governor to invalidate his dismissal. It is therefore not surprising that this request was turned down. As I have stated above, I fail to see why they did not choose to adopt the only course which was open to them at that stage, namely, to make a recommendation that Enche Ali be re-appointed with effect from the date on which they had authorized him, in my opinion, illegally, to exercise the powers and perform the duties of municipal secretary. I am equally at a loss to understand why instead of starting these proceedings an approach was not made to His Excellency the Governor to appoint Enche Ali retrospectively from 21st September, 1963.

I now come to the position of Enche Low Eam Kang, the second defendant to these proceedings. As I have pointed out, he was appointed to act as municipal secretary with effect from 21st September, 1962 by *Gazette* Notification No. 178/62. That acting appointment has never been terminated by His Excellency the Governor. The state secretary in his letters to the president of the municipality dated 7th and 15th October, 1963, was at pains to point out that the appointment of Enche Low Eam Kang was still valid and that he was then the only duly appointed person to act as municipal secretary. Yet in apparent defiance of what he stated in his letters the municipal councillors chose to allow Enche Ali to continue as municipal secretary and to deprive Enche Low Eam Kang of his right to act in the appointment of municipal secretary.

The third question raised by the applicants refers to sections 56 and 60 of the Trustee Ordinance, 1949. To my mind section 56 of the Ordinance has no application whatsoever to these proceedings. It is only under section 60 of the Ordinance that the applicants can ask for any relief. Section 60 of the Ordinance relates to the power of the court to relieve trustees from personal liabilities for any breach of trust in relation to a trust fund. What they are in fact asking is that if Enche Ali's salary has been paid unlawfully out of the municipal fund or if any other breach of trust has arisen in the course of the exercise by Enche Ali of his powers of municipal secretary they ought fairly to be excused for the breach of trust. Not wishing to criticise in harsh terms the conduct of the municipal councillors, I would content myself by saying that I can find no grounds whatsoever for exercising my discretion under section 60 of the Ordinance to excuse them for any breach of trust because I find myself unable to say that they acted honestly and reasonably.

The answers to the questions which I have been asked to determine will be as follows:—

(1) That the payments of salary and allowances of the first defendant from 1st January 1959 to 20th September 1962 and consequential to the termination of his appointment on this latter date were lawfully made, but that any payments made thereafter were unauthorised and therefore made unlawfully.

(2) That the second defendant is the only person who is lawfully empowered to exercise the statutory functions of municipal secretary in relation to the municipal fund and more particularly under sections 16(1) and 27(2) of the Municipal Ordinance (S.S. Cap. 133).

(3) That there are no grounds for relieving the applicants from personal responsibility, if any, under section 60 of the Trustee Ordinance, 1949. And I make a declaration accordingly. I also make an order that the costs of the second defendant, who appears to be the only aggrieved party in the proceedings, be paid by the applicants out of the municipal fund. I make no other order as to costs.

Declaration accordingly.

Solicitors: *Allen, Gledhill & Ball; Sault, Keith Sellar & Co.; R. R. Chelliah & K. T. Joseph.*

PASUMA PHARMACAL CORPN. v. McALISTER & CO. LTD.

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) November 16, 1964]

[Singapore — Federal Court Civil Appeal No. 15 of 1964]

Contract — Agreement for 5 years — Termination by vendor without provision for termination — Fraud of servant of purchaser — Whether termination lawful before the expiration of the contract.

Damages — Breach of agreement by one party — Duty upon other party to take all reasonable steps to mitigate loss occasioned by the breach.

The appellants appeal against the judgment of the trial judge (reported in [1964] M.L.J. 190) in so far as it relates to the counterclaim as gives the respondents damages for breach of contract and the respondents appealed against the dismissal of the counterclaim in respect of the stock of 1¾ oz. bottles remaining in their hands.

Held: (1) the respondents were not entitled even to nominal damages on that part of the counterclaim;

(2) there was no reason to interfere with the trial judge's dismissal of the counterclaim in respect of the stock of 1¾ oz. bottles remaining in the respondents' hands.

Observations on implied terms of contract.

Cases referred to:—

(1) *Bonham-Carter* v. *Hyde Park Hotel* 64 T.L.R. 177, 178.

(2) *Scammell* v. *Ouston* [1941] A.C. 251, 267.

(3) *British and Benningtons Ltd.* v. *N. W. Cachar Tea Co.* [1923] A.C. 48, 71.

(4) *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.* L.R. 10 Ch. App. 515, 526.

(5) *The Moorcook* 14 P.D. 64, 68.

(6) *Reigate* v. *Union Manufacturing Co. Ltd.*[1918] 1 K.B. 592, 605.

(7) *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 227.

(8) *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] A.C. 696, 728.

(9) *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497, 510; 42 T.L.R. 359.

(10) *British Westing-house Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673, 789.

(11) *Payzu Ltd.* v. *Saunders* [1919] 2 K.B. 581, 589.

FEDERAL COURT.

M. B. Brash for the appellants.

J. E. Lloyd for the respondents.

Cur. Adv. Vult.

Thomson L.P.: This is an appeal and a cross-appeal against certain portions of a decision of the High Court in Singapore.

The plaintiff ("Pasuma") is a corporation resident in the United States of America and carrying on there the business of manufacturing a substance which is sold under the name of essence of chicken. The defendant ("McAlisters") is a limited liability company resident in Singapore where they carry on the type of business as wholesale merchants which is popularly, but misleadingly, described as an agency business.

The facts of the case, although complicated, are not now in very great dispute and in any event have been set out in very great detail by the trial judge. Here they may safely be dealt with very briefly.

In 1957 Pasuma were anxious to sell their essence of chicken in South-East Asia and McAlisters were (they still are) the owners of a registered trade mark known as "Apollo" appropriate to such a substance and were presumably anxious to buy anything that they could resell at a profit. After some preliminary discussion they entered into an agreement which was reduced to writing in the form of a letter dated 12th November, 1957, addressed by Pasuma to McAlisters and bearing an endorsement "agreed to and accepted" by McAlisters, dated 19th November, 1957.

The material portions of that letter are as follows:—

"Below we beg to confirm our arrangement with you, as follows:

You are appointed, and you have accepted, the appointment, as exclusive distributor of our produce known as 'Apollo Brand ESSENCE OF CHICKEN,' upon and subject to the terms and conditions hereinafter contained:

1. Your territory shall be Singapore, Federation of Malaya, Sarawak, North Borneo, Brunei, Thailand and Hongkong, and we agree to sell such product to no one else in your territory.

2. We agree to sell you, and you agree to purchase from us, Apollo Brand ESSENCE OF CHICKEN at our price, C.I.F. ocean ports in your territory, as of the date of receipt of your order or orders, and we agree not to sell, or attempt to sell or quote, to any other person, firm, association or corporation, at a net price computed on an F.O.B. New York basis offered to you. . . . . .

3. We warrant that all products furnished by us to you shall be free from defects in material and workmanship, ...

4. We shall allow you $0.01 (U.S. dollars) per 3½ oz. jar and $0.0075 (U.S. dollars) per 1¾ oz. jar for promotional allowance. You shall at your own expenses conduct a continuous advertising campaign in your territory, ...

6. You are not to sell, or offer for sale, any brand of essence of chicken other than ours. . . . . .

8. This agreement shall be deemed to have begun on the first day of May, 1957, and shall continue for a term of five (5) years thereafter, and at the expiration of such term shall be renewed from year to year unless either of the parties notifies the other, by registered letter mailed at least six (6) months before the expiration of such term, of its intention to terminate such agreement. . . . . ."

I pause here to observe that the references to "Apollo Brand essence of chicken" in this letter are misleading. The truth is that the "Apollo" mark was at all material times the property of McAlisters and not of Pasuma.

Before this letter was written the parties had been dealing with each other for some time. From time to time McAlisters ordered and Pasuma sent consignments of chicken essence. At first this was supplied in cartons each containing 72 bottles of 3½ oz. size with gold-coloured tops bearing the "Apollo" mark. Later (from 1958) it was also supplied in cartons of 144 bottles of 1¾ oz. size with red tops also bearing the "Apollo" mark. The c.i.f. price was about $78 a carton and McAlisters' selling price to grocers throughout their so-called "territory" was about $150 a carton.

McAlisters experienced difficulty in selling the stuff. From the beginning they had to face the competition of other vendors of chicken essence and then they began to receive complaints regarding the "Apollo" brand chicken essence that after it had been kept for some time its appearance deteriorated; instead of being translucent as it was originally and as was the similar stuff sold by their competitors under different trade marks it became cloudy and shewed traces of sediment. This, of course, was of considerable commercial importance, for according to an analyst whose report is in evidence the benefits to be derived from consuming any sort of so-called chicken essence are "more psychological than physical".

A certain amount of dissension then arose between the parties which it is not necessary to follow in detail. At first, however, this was not very acrimonious because they were clearly anxious to continue a commerce that was highly

profitable to both. In the event Pasuma, though they never actually admitted they were in the wrong, announced that they had devised a method of producing a chicken essence which would retain its appearance, and they proposed that in future they should supply this to to McAlisters in 3½ oz. size bottles with red tops.

This was all very well as far as it went, but there remained the problems of the stocks of the less excellent stuff which McAlister had on hand and which they had paid for. It was also to be expected that at least some of the grocers with whom they had been dealing would hold stocks which they had failed to pass on to their customers and would insist on these being replaced.

Ultimately, on 2nd or 3rd January, 1959, one Moelook, a director of Pasuma, came to Singapore to discuss the matter with the directors of McAlisters and on 7th January, 1959, the parties entered into what they called an "amortization agreement"; for the sake of brevity and convenience I suppose I shall have to use the same expression.

This agreement was contained in an exchange of cables dated 5th and 7th January, 1959. The cable of 5th January addressed by McAlisters to Pasuma reads as follows:—

"REVISED STOCK AT 31/12 3783 AND 1170 EXPECTED SALES NEXT QUARTER 1500 LEAVING 3400 TO BE AMORTIZED MCALISTERS COUNTERPROPOSAL 50% AMORTIZATION OF FIRST ORDER 3000 CARTONS 3½ OZ THEN AFTERWARDS 10% PROVIDED NO INCREASE PRICE UNTIL TOTALLY AMORTIZED STOP EXPECTED INDENTS 1959 12000 CARTONS PLEASE ADVISED".

The reply dated 7th January was that this proposal was accepted in full. Later, by a letter dated 18th December, 1959, Pasuma undertook to supply free of charge an additional 363 cartons by way of compensation for import duty which had been paid by McAlisters on the transfer from Singapore to the Federation of stock in the hands of retailers there which had to be replaced.

It is not necessary to discuss in full the legal effect of this agreement. In practice, however, the parties would seem to have regarded its effect as this. On 31st December, 1958, McAlisters had in stock 3,783 cartons of 3½ oz. bottles with gold tops and 1,170 cartons of 1¾ oz. bottles with red tops and it was anticipated that during the next quarter 1,500 cartons of both kinds of bottles would be sold. On this assumption McAlisters would be left with about 3,400 cartons. Pasuma would replace these free of charge with the same number of cartons of 3½ oz. bottles with red tops in the following way. McAlisters would place a first order for 3,000 cartons, half of which would be supplied free and the balance of the replacement cartons would be supplied at the rate of 10% of each subsequent order by McAlisters.

Pasuma would thus compensate McAlisters for their loss in respect of inferior quality material which they still had in stock, or might have to take back from grocers, and could not sell by replacing this with red-topped 3½ oz. bottles of good material and in addition they would supply 363 cartons of the red-topped 3½ oz. bottles to make up for what had been lost in payment of customs duty.

For some time business continued on this basis and by the middle of August, 1960, a substantial number of cartons of red-topped 3½ oz. bottles had been supplied free of charge by Pasuma. As regards the number of cartons supplied there are discrepancies which make this difficult to ascertain but the exact figures are no longer of importance.

Some time previously, however, Pasuma would appear to have begun to entertain suspicions as to McAlisters' good faith in carrying out their part of the amortization agreement which was to treat the red-topped bottles supplied under it as replacements for the old bottles which, in their view, McAlisters were bound to withdraw from circulation. At the same time it was alleged (the trial judge held this was not made out) that they were seeking an excuse to break off relations with McAlisters in favour of one Teo who had been but who about this time ceased to be a director of McAlisters.

Ultimately, on 3rd June, 1960, Pasuma wrote a letter stating they were not going to proceed with the amortization scheme and on 22nd July they asked McAlisters to allow their stocks of chicken essence and the relevant documents of account to be examined by an accountant. McAlisters agreed and on 15th August, 1960, an accountant named Cowin visited McAlisters' premises. He found that McAlisters, on the shewing of their own stock accounts, should have received 2,312 cartons of red-topped 3½ oz. bottles (including 363 in respect of customs duty) under the amortization agreement, that they had in fact received 1,935 cartons but that only 1,844 cartons of the stock which was supposed to have been thus replaced were physically present or could be accounted for on the face of the records. The following day, 16th August, Dennis, the director of McAlisters who had been in charge of the chicken essence business, resigned and Cowin furnished his report to Pasuma's solicitor. The same day Pasuma's solicitor wrote to McAlisters stating, "I am to take immediate delivery from you of 1,923 cartons of Apollo chicken essence containing 3½ oz. bottles topped with gold lids which are the property of my clients having been substituted free of charge with other cartons under an

agreed amortization scheme". It is not clear how the figure of "1,923" came into this letter (it may have been a mistake for "1,935"), but the point is not important. The next day, 17th August, a private detective, acting on behalf of Pasuma, went to McAlisters warehouse where he was handed 1,289 cartons and 69 loose jars of chicken essence in gold-topped bottles. These were later taken out to sea and sunk.

Then on 20th August Pasuma wrote a letter to McAlisters purporting to terminate the original agreement of 12th November, 1957, on the ground that they had continued to sell stock which at their own request had been withdrawn as being of bad and inferior quality and which was by agreement replaced by Pasuma with other stock and thereby became the property of Pasuma and that this act was "of such a nature that we can no longer permit our agency to remain in your hands". The letter went on to offer to relieve McAlisters at cost of any stocks still in their hands. This, presumably, was said with reference to the difference between the 2,313 cartons which, according to Cowin, should have been replaced and the 1,935 (or 1,923) cartons which had been replaced.

There then ensued a long correspondence between the solicitors of the parties and in the event the present proceedings were commenced by Pasuma on 17th September, 1960.

In these the plaintiffs claimed damages for the conversion of 646 cartons and 15 bottles of Apollo chicken essence contained in 3½ oz. gold-topped bottles or alternatively for the detention of the same number of 3½ oz. bottles with red topped lids and damages for breach of the amortization agreement of 7th January, 1959.

The defence was a denial of liability and there was a counterclaim which can be summarised under three heads:—

(1) a claim for damages for breach of the original agreement, the breach being its purported termination by the letter of 20th August, 1960;

(2) a claim for $69,202 in respect of $647\frac{127}{144}$ cartons of 1¾ oz. bottles of chicken essence of inferior quality still in McAlister's possession which Pasuma were bound to replace by reason of the amortization agreement;

(3) a claim for $44,495 owed to the defendants by a firm in Hong Kong which debt had been guaranteed by Pasuma.

Ambrose J. dealt with the matter in a long, careful and wholly admirable judgment which would be difficult to summarise if such a course were necessary but with much of which we are not concerned here. He reviewed the whole course of the relationship between the parties and after particular consideration of the amortization agreement and the state of McAlisters' stocks in July, 1960, he held there had been neither conversion nor detinue on the part of McAlisters. He held, however, that Dennis had fraudulently "inflated" by 500 cartons the amount of chicken essence to be replaced by Pasuma under the amortization agreement and that McAlisters were liable for Dennis' fraud and were accordingly liable to pay to Pasuma the c.i.f. cost of 500 cartons which at $78 a carton came to $39,000. He also found that McAlisters were liable in respect of 128 cartons replaced by Pasuma which they had falsely alleged to have been physically destroyed by them and in this connection he held Pasuma were entitled to recover $10,034. On the other hand it had been agreed that McAlisters were entitled to an allowance of $15,240 in respect of customs duty which had been paid on chicken essence sent to the Federation and subsequently returned to Singapore and later delivered to Pasuma. It had also been agreed that McAlisters were entitled to credit in respect of 26 cartons of 3½ oz. gold-topped bottles which had been discovered during the trial and this came to $2,103. In the event he found Pasuma were entitled to recover $31,690 on the claim.

As regards this portion of the decision there is no appeal and it is not therefore necessary to discuss the course of reasoning which led to it.

The trial judge dealt with the counterclaim as follows.

As regards the claim for damages in respect of the termination of the original agreement he found that this was wrongfully determined by Pasuma and that McAlisters were entitled to damages which he assessed at $650,000.

As regards the claim for damages by reason of Pasuma's failure to replace 634 cartons of 1¾ oz. bottles of inferior quality which remained in the possession of McAlisters he found that Pasuma had offered to relieve McAlisters of this stock at cost; that this offer had been refused; that McAlisters were bound to take all reasonable steps to mitigate any damages they might have suffered; that by refusing Pasuma's offer they had failed to do so; and that therefore they were not entitled to anything under this head.

As regards the counterclaim in respect of the debt owed by the Hong Kong firm and guaranteed by Pasuma the judge held that this was made out and that on this McAlisters were entitled to recover $44,495. No complaint has been made regarding this.

In the event judgment was entered for Pasuma on the claim for $31,690 and for McAlister on the counterclaim for $694,495.

Pasuma have now appealed against so much of the judgment on the counterclaim as gives McAlisters damages for breach of contract and McAlisters have appealed against the dismissal of the counterclaim in respect of the stock of 1¾ oz. bottles remaining in their hands.

To deal first with the Pasuma appeal, I would observe in the first place that even if their letter of 20th August, 1960, did amount to a breach of the contract it is not, in my view, possible to justify the sum of $650,000 awarded by way of damages.

That figure was arrived at in this way. The contract was for five years and on 20th August, 1960, it had about 20 months to run. McAlisters' sales of the chicken essence amounted to about 500 cartons a month and their profit was about $65 a carton. On those figures if the contract had continued for its full period their profit during the last 20 months would have been 500 × 65 × 20 = $650,000.

The figures are correct but the basis of the whole assessment is the assumptions that the contract was for the supply of "Apollo" brand chicken essence and that this could only be obtained from Pasuma. These assumptions, however lack foundation. The contract was not for the supply of "Apollo" brand chicken essence, it was for the supply of chicken essence in bottles bearing the "Apollo" mark and the "Apollo" mark was not the property of Pasuma but of McAlisters themselves. On the evidence it is clear that chicken essence is a fairly common article of commerce and a great deal of it is made by persons other than Pasuma. In the circumstances if McAlisters were to be entitled to substantial damages it was for them to shew that either they had been unable to obtain chicken essence to sell under the "Apollo" mark from any other source or that they had only been able to do so at a price which would produce a lower profit than if they had been able to continue to buy from Pasuma.

They did not produce a scrap of evidence to show either of these things and as Lord Goddard C.J. said in the case of *Bonham-Carter* v. *Hyde Park Hotel*:—[1]

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

In the circumstances if there was a breach of contract McAlisters were only entitled to nominal damages.

But was there a breach?

It is true that when Pasuma originally repudiated the 1957 agreement by their letter of 20th August, 1960, they did so on the ground of McAlisters' alleged act of continuing to sell stock of bad and inferior quality which had been by agreement "amortized". This was a ground for repudiation which probably could not be supported. At the trial, however, they relied on the fraud of McAlisters' agents as a ground on which they were entitled to repudiate.

Now it seems clear that if there was fraud and if it was a breach of, and a breach going the root of, the original agreement Pasuma were not in any way prevented from relying on that by the terms of their letter of 20th August which was written at a time when they had grounds for suspicion but for less than certainty that a fraud had been committed.

As Lord Wright said in the case of *Scammell* v. *Ouston*:—[2]

> "when they were sued for breach of contract they were entitled to resist the claim on any good ground that was available, regardless of reasons which they had previously given. As Lord Summer pointed out in *British and Benningtons, Ltd.* v. *N. W. Cachar Tea Co.*,[3] if a party repudiated a contract giving no reasons at all, all reasons and all defences in the action, partial or complete, would be open to him. Equally would this be so, I think, if he gave reasons which he could not substantiate."

At this stage, while it may not be conceded, it is certainly not very strenously denied that McAlisters' agents behaved fraudulently and for this McAlisters are liable. There is no question that at some stage, probably this dates from a letter written by Dennis on 31st October, 1959 (Exhibit AB.41), the figures as to the amount of inferior quality chicken essence which remained on McAlisters' hands and accordingly fell to be replaced by better quality stock under the amortization agreement became "inflated" by 500 cartons. When it is said that this figure was "inflated" it means it was falsely stated to be greater than it was. Who had the benefit of this is not altogether clear, and perhaps it would be unfair to say that Dennis was alone to blame. Nevertheless the fact remains that as soon as an independent outside check was made on McAlisters' stocks Dennis resigned his, presumably, lucrative appointment as a director and on 25th August, 1960, McAlisters' solicitors wrote a letter to Pasuma's solicitor referring to the Pasuma letter of 20th August in which they said:—

> "So far as our Clients are aware no such bad stock has ever been sold on the market but certain irregularities have recently come to their attention which have resulted in the resignation of Mr. Dennis, the Director in Charge of this Department of our Clients' business. Our Clients do not feel, however, that irregularities by one individual carried out without the knowledge of any of the other directors should cause your Clients to take any drastic action damaging to all parties concerned."

They then continued:—

"In the circumstances, we are instructed by our Clients to reconsider their action and to confirm to them that it is our Clients earnest desire to have the entire position regularised so that the previous happy relationship existing may once again be restored."

This is not, as is most of the correspondence in the case, a letter written on an "old boy" basis by one trader to another; but it is a letter written by one solicitor to another after the parties were at arm's length and it is difficult to regard it as anything but an admission of what is somewhat euphemistically calls irregularities. And although there may be doubt as to who actually gained by the fraud there is no doubt as to who would have lost had it not been detected and that is Pasuma.

That brings me to the questions of whether this fraud was a breach of the contract between the parties and whether it was a breach that entitled Pasuma to repudiate the contract.

The trial judge took the view that there was no express term in the contract of which fraud constituted a breach. Further, the relationship between the parties was not that of principal and agent but that of vendor and purchaser of goods, and that as a matter of law there is no implied term in such a contract requiring good faith between the parties as there is in a contract between principal and agent. With respect, that is to be accepted as correct as far as it goes. But does it go far enough?

While the original agreement was primarily an instalment contract for the sale of goods its terms call for some examination.

It clearly contemplated a course of dealing between the parties for at least five years. During that period McAlisters were to buy from Pasuma all the chicken essence they could sell and they were to sell it under their "Apollo" trade mark, but they were not to sell it outside the area covered by the agreement. On the other hand Pasuma were not to sell chicken essence to anybody in that area except McAlisters. There was a provision, under which the amortization agreement was later made, by which Pasuma undertook to replace any defective stock supplied by them. McAlisters were to advertise the stuff continuously and Pasuma were to assist with the cost of this advertising.

In the circumstances it is difficult to resist the conclusion that there was an implied condition that in relation to their business as covered by the contract the parties should be reasonably honest and truthful with each other. It may well be that in the words of Sir William James in the case of *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha, and Telegraph Works Co.*,[4] "the clearer a thing is, the more difficult it is to find any express authority or any *dictum* exactly to the point.' Nevertheless here I think assistance is to be had from authority.

An examination of any question of this sort must inevitably start from the much-quoted words of Bowen L.J. in *The Moorcook*:—[5]

"Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side."

The most usual way of ascertaining whether a case falls within that principle is the application of the "officious bystander" test which was thus propounded by Scrutton L.J. in the case of *Reigate* v. *Union Manufacturing Co., Ltd.*:—[6]

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

The same thing was thus put by McKinnon L.J. in the case of *Shirlaw* v. *Southern Foundries (1926) Ltd.*:—[7]

"If I may quote from an essay which I wrote some years ago, I then said: '*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testify suppress him with a common "Oh, of course!" '

At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong."

No doubt that test is to be applied in an objective way. As was said by Lord Radcliffe in the case of *Davis Contractors Ltd.* v. *Fareham Urban District Council*:— [8]

"If the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must be given 'irrespective of the individuals concerned, their temperaments and findings, their interest and circumstances' (*Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*)".[9]

Applying that test to the present case the answer seems to be clear. If the officious bystander had said to "Bob" of Pasuma and "Will" of McAlisters while they were discussing the original agreement, "What happens if in settling a claim in connection with stock which is admitted to be defective one of you tells lies to the other and tries to swindle him?" then in

all probability the actual result would have been that the officious person would have been thrown downstairs. But had "Bob" and "Will" been the reasonable men contemplated by Lord Radcliffe it is impossible to resist the conclusion that the answer would have been, "That would be the end of the relationship between us".

After all it is difficult to see how without such a term "business efficacy" could have been given to the contract. It was to continue for a very long time and throughout that time there was always the possibility that the question of replacement of defective stock would arise. In fact that question did arise and was settled by the "amortization agreement" in a way that was certainly not less favourable to McAlisters than the provision of the original agreement that required them to return to America at their own expense all stock alleged to be defective. And it was in connection with this agreed modification of the original agreement that the fraud occurred. How could there be any "business efficacy" in an agreement which required the parties to go on dealing with each other after it was discovered that McAlisters' servants had been defrauding Pasuma for their own benefit or that of their masters?

In my view, then, McAlisters were not entitled even to nominal damages on this part of the counterclaim.

Passing now to the McAlisters' appeal, that is against the dismissal of so much of the counterclaim as was based on the 1¾ oz. red-topped bottles of inferior stock which remained on McAlisters' hands when the original agreement was terminated and which, they claimed, should have been replaced under the amortization agreement.

Here there is the same confusion as to figures as runs throughout the whole case and which probably arises from the fact that McAlisters' stocks were spread all over the country and could not easily be ascertained at any given time.

The cable of 7th January, 1959, stated that at 31st January, 1958, McAlister had in stock 1,170 cartons of the 1¾ oz. bottles. There is nothing to show that that figure is wrong and in any event it was accepted by both parties as the basis of the amortization agreement. Then on 15th August, 1960, the accountant Cowin found that there were only 555 cartons in stock in Singapore. That figure has not been attacked but of course there may have been stocks in existence elsewhere than in Singapore. Be that as it may the figure finally stated in the counterclaim was 634 $\frac{127}{144}$ cartons and the cost of these was claimed to be $109 a carton, a figure which presumably contains an element in respect of customs duty paid on stocks held in the Federation.

The answer to this was that McAlisters had deliberately refrained from mitigating any damage they might have suffered in this connection and it was on this ground that the trial judge, whose course of reasoning I propose, with respect, to follow, dismissed this claim.

In their letter of 20th August, 1960, addressed to McAlisters, that is the letter by which they repudiated the contract, Pasuma said this:—

> "We are quite prepared to relieve you at cost of all stock now on your hands, and if you so agree please forward to our attorney, Mr. M. B. Brash, a full statement of all stock now held by you, for our consideration."

I pause to observe that no figure is mentioned here, the offer is in perfectly general terms.

To that offer there was no reply and on 31st August Pasuma's solicitor in a letter to McAlisters' solicitors referred to it in the following terms:—

> "In my client corporation's letter of the 20th August 1960, paragraph 3, they have requested that your clients send me a full statement of all stock now held by them for consideration, if your clients wish to be relieved at cost of the stock which they at present hold. My instructions are that this position is to be dealt with at once, and I would be glad if you would impress upon your clients that it is urgent."

The reply was conveyed in a letter from McAlisters' solicitors to Pasuma's solicitor dated 7th September, 1960, and was as follows:—

> "Our clients do not wish to be relieved of the stock which they at present hold and which they are continuing to sell. A sudden withdrawal of all stock from the market would, of course, cause irreparable damage to the product."

Then on 3rd October, 1960, that is to say two weeks after the issue of the writ, McAlisters' solicitors wrote the following letter:—

> "We have to advise you that our clients have ascertained that red lid stocks of 1¾ ozs. chicken essence supplied to them before the 'cracker' stocks were introduced have shown the same signs of deterioration as the Gold Lid stocks, containing sediment and lumps. They are clearly unfit for sale.
>
> The amounts in Malaya total 355 cartons, in Singapore 298 cartons. These 653 cartons have in no way been brought into account in the figures so far put forward either by your clients or ours."

Now, it is clear that by reason of the amortization agreement Pasuma were bound to replace the original 1¾ oz. bottles of inferior stock which McAlisters had left on their hands and at the date of the issue of the writ they had not done so in respect of the stock involved in this part of the counterclaim.

It is, however, well-settled law that a person who suffers from a breach of contract is bound to do all that a reasonable and prudent man would do in the circumstances to mitigate his

loss (see *per* Haldane L.C. in *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Railways Co. of London, Ltd.*).[10]

Pasuma had offered, indeed they offered twice, to fulfil their side of the contract by relieving McAlisters of the stocks they held and I agree with Ambrose J. that as a matter of fact it was unreasonable of McAlisters to reject this offer. As was said by Scrutton L.J. in the case of *Payzu Ltd.* v. *Saunders*:—[11]

"In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact."

After all Pasuma's offer was a perfectly general one, that is it was not limited to any specified amount of stock. McAlisters took over two weeks to consider it and then they rejected it.

In the circumstances I see no reason for this court to interfere with this portion of the judgment appealed against.

I would, then allow the Pasuma appeal and dismiss the McAlisters' appeal in each case with costs.

Wee Chong Jin C.J. (Singapore) and **Tan Ah Tah F.J.** concurred.

Orders accordingly.

Solicitors: *M. B. Brash; Drew & Napier.*

RATNAM v. CUMARASAMY & ANOR.

[P.C. (Lord Hodson, Lord Guest and Lord Donovan) November 23, 1964]

[Privy Council Appeal No. 41 of 1962]

Practice and Procedure — Appeal — Time for filing record of appeal — Application for extension — Refusal by Court of Appeal — Review of discretion of court — Board slow to interfere in questions of procedure — R.S.C. 1957 O. 58 rr. 15, 21 and 22, and O. 64 r. 7.

This was an appeal from an order of the Court of Appeal dismissing an application for an order that the time for filing the record of appeal be extended. Application was made on the day of expiry of the time for filing the record and the ground for the application was that the appellant had instructed solicitors only the day before. The application was dismissed by the Court of Appeal. On appeal to the Privy Council,

Held: (1) the Board will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice. Upon questions of procedure the Board is slow to interfere with the discretion exercised by a local court;

(2) to justify an extension of time for the filing of the record there must be material upon which the court could exercise its discretion, for otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which was to provide a time table for the conduct of litigation.

Semble: The observations of Bramwell L.J. in *Atwood* v. *Chichester* [4] when he said "When sitting in Chambers I have often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs" had reference to a case where the application was to set aside a judgment by default and are not of general application.

Cases referred to:—

(1) *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130.

(2) *Evans* v. *Bartlam* [1937] A.C. 473.

(3) *Mayor of Montreal* v. *Brown & Anor.* (1876) 2 App. Cas. 168.

(4) *Atwood* v. *Chichester* (1878) 3 Q.B.D. 722 at page 723.

PRIVY COUNCIL.

Ian Percival, Q.C. (*Mrs. Margaret Puxon* with him) for the appellant.

M. R. E. Kerr, Q.C., (*M. J. Mustill* with him) for the respondents.

The judgment of the Lords of the Judicial Committee was delivered by,

Lord Guest: This is an appeal from an order of the Court of Appeal of the Supreme Court of the Federation of Malaya, dated 15th May 1962 dismissing an application made by the appellant by notice of motion, dated 18th April 1962, for an order that the time for filing the record of appeal be extended to 14 days from the date of the order sought.

On 3rd February 1962 Ong J. gave judgment for the respondents in an action brought by the appellant against them in the Supreme Court of the Federation of Malaya in the High Court at Kuala Lumpur and dismissed the appellant's claim with costs. In this action the appellant claimed a half interest in properties having a value of not less than $428,000 or about £50,000.

The appellant was entitled as of right and without leave to appeal against the judgment and order to the Court of Appeal.

Under the Rules of the Supreme Court of the Federation of Malaya by Order 58, rule 15 the notice of appeal had to be filed within one month and in accordance with Order 58, rule 21 the appellant on 2nd March 1962 personally filed four copies of the notice of appeal and the sum of $500 as security for the costs of the appeal.

In accordance with Order 58, rule 22 the